

A JUVENILE

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v.

PP

HIGH COURT SABAH & SARAWAK, KOTA KINABALU

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IAN HC CHIN J

[JUVENILE APPEAL NO: K41-05-2002]

3 SEPTEMBER 2002

CONSTITUTIONAL LAW: Courts - Jurisdiction - Whether magistrate court has jurisdiction to hear case under Juvenile Courts Act 1947 - Subordinate Courts Act 1948, s. 111 - Effect of s. 111 Subordinate Courts Act 1948 on state laws - Effect of s. 111 Subordinate Courts Act 1948 on federal laws - Decision of Shim Tshun Fatt v. PP - Whether correct - Malaysia Act 1963, s. 74

c

CRIMINAL PROCEDURE: Plea of guilty - Unequivocal plea - Whether juvenile entered an unequivocal plea of guilty

d

CRIMINAL PROCEDURE: Report or certificate - Probation report - Whether admitted in evidence - Whether probation officer should be sworn in as witness

e

CRIMINAL PROCEDURE: Juvenile - Detention order at Henry Gurney School, appeal against - Whether order made was proper - Whether plea of father to take care of juvenile taken into consideration - Whether juvenile went into a string of crimes for three days - Whether juvenile was given a chance to sit for his SPM examination - Whether juvenile was bent on a life of crime

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This was an appeal by one of two juveniles ('the juvenile') against the detention order of the magistrate on a charge of theft of a motor vehicle, an offence under s. 379A of the Penal Code. The order of detention was made for three years at the Henry Gurney School. A stay order was granted after the juvenile had served the detention order for about seven months. It was argued on behalf of the juvenile: (1) that the magistrate had no jurisdiction to hear the case under the Juvenile Courts Act 1947 in view of s. 111 of the Subordinate Courts Act 1948 ('the Act'). Section 111 of the Act provided the substitution of any reference in any written law passed before 1 June 1981 to a magistrate of the First Class with a President of a Sessions Court and that consequently only a sessions court judge could preside over a juvenile court; (2) that the juvenile did not enter an

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- a* unequivocal plea of guilty; (3) that the probation officer was not sworn in as a witness to give evidence as to the substance of the probation report; (4) that there was no common intention between the juvenile and the other as they blamed each other for initiating the crime; (5) that the detention order was not proper because the magistrate (i) failed to take into account the plea of the father to take care of the juvenile, (ii) held an erroneous view that the juvenile had gone into a string of crimes within a period of three days, and (iii) failed to take into account that the juvenile had to take his SPM examination.
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Held:

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- [1]** By virtue of the Subordinate Courts Act (Extension Order) 1980, the Subordinate Courts Act 1948 was modified and extended to Sabah and Sarawak. The order was made pursuant to s. 74 of the Malaysia Act 1963. By virtue of s. 74(2) and 74(3) thereof no such order shall modify any state law. It followed that s. 111 of the Subordinate Courts Act 1948 ought not to be construed in isolation. It must take into account the limitation imposed by s. 74 of the Malaysia Act 1963 under which the modification was made. Therefore, “written law” in s. 111 of the Subordinate Courts Act 1948 cannot apply to any state law since state law cannot be changed, modified or altered by virtue of s. 74 thereof. (pp 177 b, 179 c & 186 b)
- d*
- e*
- [1a]** In its application to Federal law, the term “written law” in s. 111 of the Subordinate Courts Act 1948 must be confined to those federal laws that specifically mentioned and made provisions “in relation to Sabah and Sarawak” which could be interpreted to mean also “East Malaysia”. It followed that as the Juvenile Courts Act 1947 did not contain any specific reference to Sabah and Sarawak or to East Malaysia, the magistrate had the necessary jurisdiction under the Act and was the proper officer to preside over the juvenile court. The decision of *Shim Tshun Fatt v. PP* was only correct in its application to the Immigration Act 1953/1967 as s. 58(1)(b) of the same Act made a specific reference to Sabah or Sarawak by using the term “East Malaysia”. Further, the term “Stipendiary Magistrate” was used in that section and such a term could only be used when reference was made in relation to Sabah and Sarawak where such officers existed and not in West Malaysia. (p 186 c-f)
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- [2] Both juveniles pleaded guilty to the charge and the juvenile's father was also present in court and admitted to the facts of the case. Though it was argued that the plea was unequivocal because the two juveniles blamed each other in the welfare report, there was no denial that they committed the act and it did not matter who initiated it. (p 187 d) *a*
- [3] The record showed that the probation report was indeed tendered after the juvenile had pleaded guilty. The report was then read and explained to the juvenile and he admitted to the truth or correctness of what was stated in the report. Given the admission, the probation officer need not swear to tender the report. When the truth of what is stated in the probation report, read and explained to a juvenile is not disputed, it can be used by the court without having to call the probation officer. There is no requirement under the law that sworn evidence must be led after a person had pleaded guilty before the person can be convicted and sentenced. In any event, there was no miscarriage of justice. (pp 187 e-h & 188 a-d) *b*
- [4] That there was no common intention between the juvenile and the other as they blamed each other for initiating the crime did not negate the facts that they went out together planning to do together what they had in fact done. (p 188 e) *c*
- [5] Providing the juvenile with proper education was a matter of great importance as with education, the path to a good paying job was open to the juvenile and this would provide him with an alternative to crime as a way of life. So the court must encourage him to sit and do well in his SPM examination instead of dismissing him as having no prospect of making it which the magistrate seemed to have done. (p 189 h) *d*
- [6] The juvenile was genuinely contrite and was very worried that he would not be allowed to continue his study if his school found out what had happened. The magistrate dismissed the idea of letting the parents take care of the child because the offence of theft was a serious offence. However, the seriousness of the offence should not disentitle the parents to take care of the juvenile. The magistrate should have weighed the better of the alternatives, *ie*, of either sending the juvenile to the Henry Gurney School or of letting the parents take care of the juvenile. It was in the interest of the public that the juvenile realised his mistake which he did and that he be properly educated which letting his parents take care of him would provide. (p 190 b-d) *e*
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- a* [7] The magistrate failed to appreciate that this was not a juvenile bent on a life of crime but one who was placed in a dilemma where, not unexpectedly given his age and for fear of damaging his father's car, made a wrong decision to go with the other to have the car fixed in Kota Kinabalu. There, the frolic continued with one theft after another in a space of 12 hours and not three days as the magistrate had found. The time he had already spent in the Henry Gurney School would be a sufficient lesson for him. Further, the school was not appropriate as it failed to prepare and arrange for the juvenile to sit for the SPM examination. (p 190 d-f)

- c* [Order of magistrate set aside; juvenile to be discharged after being admonished.]

Case(s) referred to:

Ong Ah Thoo v. R [1949] 15 MLJ 36 (*refd*)

- d* *Shim Tshun Fatt v. PP* [2001] 1 CLJ 154 (*dist*)

Tukiran Taib v. PP [1955] 21 MLJ 24 (*refd*)

Legislation referred to:

Courts Ordinance 1948, ss. 60, 76(1), 110

Federal Constitution, arts. 74

Immigration Act 1953/1967, s. 58(1)(b)

- e* Malaysia Act 1963, s. 74(2), (3)

Penal Code, s. 379A

Poisons Act 1952, s. 33

Subordinate Courts Act 1948, ss. 61, 78(b), 80, 85, 111

- f* For the juvenile appellant - *Francis Wong; M/s Peter Lo & Co*

For the PP - *Abdul Rashid Sudin SFC*

Reported by Usha Thiagarajah

JUDGMENT

- g* **Ian HC Chin J:**

Two juveniles were charged with the theft of a motor vehicle, an offence under s. 379A of the Penal Code and they both pleaded guilty. A probation report was tendered and the two advisers were of the view that both the juveniles should be sent to the Henry Gurney School for a period of three years. On 17 April 2001, the magistrate made an order of detention for three years. The present appeal is by the second juvenile who has no parents and his known relative could not afford to come to Kota Kinabalu from Sandakan. A stay of the order was only granted on 3 January 2002

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after he had served the detention order for about seven months already. He has since obtained the service of an advocate to argue his appeal against the detention order.

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The first ground of appeal was that, the magistrate of the first class has no jurisdiction over the matter as only a Sessions Court judge can sit in a Juvenile Court in view of s. 111 of the Subordinate Courts Act 1948 which provided the substitution of any reference in any written law passed before 1 June 1981 to a magistrate of the first class with a President of a Sessions Court and that consequently only a Sessions Court judge can preside over a Juvenile Court. A little of the legislative history must be gone into.

b

In North Borneo (as Sabah was then known), there was the Courts Ordinance (Cap. 29) which was in force from 1951. It established courts of magistrates of three classes, first, second and third and the said Ordinance spelt out their criminal and civil jurisdiction. Their powers in criminal jurisdiction “shall be as provided in this Ordinance and in the Criminal Procedure Code” and such courts are constituted by magistrates of the respective class. The North Borneo Criminal Procedure Code was also in existence and it spelt out the jurisdiction of the various courts and it confers upon the courts (including the High Court) the powers to try cases under the North Borneo Penal Code. The courts also have powers to try cases under other laws and that provision says:

*c**d**e*

9(1) Subject to the other provisions of this Code, any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court. (2) When no Court is so mentioned it may be tried by the High Court or any other Court to which this Code applies: Provided that (a) no Court of a Magistrate of the First Class shall try an offence which is punishable with imprisonment for a term which may exceed two years or by a fine which may exceed five thousand dollars; (b)... (c) ...

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In 1961, the North Borneo Criminal Procedure Code was amended to include the definition for a “Stipendiary Magistrate” and it means “any magistrate declared to be a Stipendiary Magistrate by warrant under the provisions of the proviso to s. 8.” That proviso reads:

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Provided that the Governor, on the recommendation of the Chief Justice, may by warrant which shall be published in the Gazette, declare any magistrate to be a Stipendiary Magistrate and authorize any such magistrate to try any offence specified in such warrant notwithstanding the limitations set forth in the eighth column of the First Schedule, and in the event of such Magistrate exercising any jurisdiction which by the provisions of the eighth column of the First Schedule is to be exercised by the High Court

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- a* the provisions relating to trials and matters incidental to trials of offences by the High Court shall apply *mutates mutandis* to all such trials and incidental matters where a Magistrate is exercising such powers conferred upon him by such warrant.
- b* This office of a Stipendiary Magistrate carried with it enhanced jurisdiction and try certain offences which otherwise were triable by a judge of the High Court. The appointment of magistrates were made by the Governor which in those days consisted of government officers like junior administrative officers (see for example GN 689 of 1956, the appointment of Lim Thien Kwang “to exercise the powers of a magistrate of the first class while stationed as a Junior Administrative Officer at Tawau”). All
- c* these ordinances were declared federal law in 1965 under the powers of s. 74 of the Malaysia Act 1963. It was in that year also that various provisions of the Courts Ordinance were modified including the changing of its name to Subordinate Courts Ordinance. This Ordinance was
- d* subsequently repealed in 1981 with the extension of the Malaya Subordinate Courts Act to Sabah after modifications.
- In Malaya and since 1948, it also had a Courts Ordinance 1948 which provided for the establishment of Sessions Courts, Magistrates’ Courts and Penghulu’s Courts apart from the establishment of higher courts, that is
- e* the Supreme Court, the Court of Appeal and the High Court. In those days, administrative officers are first class magistrates. Appeals lie from the Penghulu’s Court to a first class magistrate. As for second class magistrate “any fit and proper person” may be appointed by the Ruler of a Malay State or the High Commissioner of a Settlement. That Ordinance also sets
- f* the limits of the criminal and civil jurisdiction of the various courts. The Sessions Court is presided by a President to be appointed by the High Commissioner on the recommendation of the Chief Justice and he is generally a person who qualifies to be an advocate. Penghulu’s Courts have civil jurisdiction over “persons of an Asian race speaking and understanding the Malay language and limited to the recovery of a debt not exceeding
- g* RM50 while its criminal jurisdiction was restricted to the trial of charges against persons “of an Asian race” and confined to minor offences. This court is presided by “a Penghulu authorized by Kuasa to hold court”. The jurisdiction of these courts were increased from time to time. Except for
- h* the post of the President of the Sessions Court, it does not appear that for other judicial posts that the holder need any legal qualification. However, by 1980, the post of magistrates of the first class would require the holder to have legal qualification because such person must be a member of the Judicial and Legal Service which membership is opened to
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legally qualified persons. This ordinance was extensively amended after Malaya gained its independence and the provisions dealing with the higher courts were deleted and the ordinance renamed Subordinate Courts Act.

Then, as mentioned earlier, by the Subordinate Courts Act (Extension Order) 1980 (PU(A) 357/1980), the Subordinate Courts Act 1948 (and the rules made thereunder) was modified and extended to Sabah and Sarawak. The order was made pursuant to s. 74 of the Malaysia Act 1963 which says:

S. 74(1) Subject to the provisions of this section the Yang di-Pertuan Agong may by order make such modifications as appear to him necessary or expedient in consequence of the passing of this Act in any present law relating to matters about which Parliament has power to make laws.

(2) Subject to sub-section (3), the power to make orders under sub-section (1) shall include power to extend throughout Malaysia or in any State or States thereof any present law in force in any part of Malaysia about any such matter; but except in consequence of the extension of a present law, no such order shall modify any State law.

(3) Any order under sub-section (1) shall not, without the concurrence of the Ruler or Governor, as the case may be, make as respects any State any provision which in an Act of Parliament could not be made or could not come into force without the agreement (however expressed) of a State authority, nor extend to the State any law relating to matters about which the Legislature of the State has power to make laws, nor modify any State law.

(3A) In addition to the powers conferred by subsections (1) and (2); the Yang di-Pertuan Agong may, with the concurrence of the Ruler or Governor of each State in Malaysia in which the law has effect, by order declare any present law to be a federal law, whether that law relates:

(a) wholly to a matter in the Federal List; or

(b) partly to a matter in the Federal List and:

(i) partly to a matter in the State List or the Concurrent List; or

(ii) partly to a matter in the State List and partly to a matter in the Concurrent List;

and any order so made shall, unless or until it is amended or repealed, be conclusive evidence that any law declared by it to be a federal law is a federal law.

- a* (4) In any present law of a Borneo State or of Singapore which is to be treated as State law, the Yang di-Pertuan Agong may by order make (in addition to any modifications made under sub-section (1)), such modifications as may be requested by the Governor and appear to him to be necessary or expedient in consequence of the passing of this Act.
- b* (5) Any Act of Parliament or other law passed for the Federation before Malaysia Day which in the States of Malaya has effect as State law may by order of the Yang di-Pertuan Agong be extended to a Borneo State or Singapore, with or without modification, so as to have effect as State law in that State; but no law extended to a State under this sub-section without the concurrence of the Governor shall come into operation in the State until adopted by an enactment of the Legislature.
- c* (6) Any provision made by an order under this section with respect to any law may be amended or repealed:
- (a) in like manner as that law; or
- d* (b) subject to subsection (8), by an order made in like manner as the order by which the provision was made.
- (7) Orders under this section may be made at any time after the passing of this Act, and references to the Governor of a State shall be construed accordingly; and as respects the Federation orders under this section may
- e* be made to have effect before Malaysia Day.
- (8) Any power to make orders under this section shall, notwithstanding anything contained in this section, after the 9th day of August, 1965 (hereinafter referred to as "Singapore Day"):
- f* (a) cease to apply to any present law of Singapore;
- (b) apply to any law passed or made in any part of Malaysia other than in Singapore between Malaysia Day and Singapore Day;
- (c) not affect the law of Singapore as in force on Singapore Day;
- g* (d) apply to such modifications as appear to the Yang di-Pertuan Agong necessary or expedient in consequence of the passing of the Constitution and Malaysia (Singapore Amendment) Act, 1965, as well as this Act; and
- h* (e) continue until the end of August, 1966, and thereafter until Parliament otherwise provides.

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(9) Any order under this section shall be laid before each House of Parliament; and if either House, at or before the second meeting begun after the order is laid before it, resolves that the order or any provision in it be annulled, the order or that provision of it shall cease to have effect, but without prejudice to anything previously done thereunder.

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(10) In this section “modification” includes amendment, adaptation and repeal, and any power under this section to make modifications includes power to provide for savings and other transitional provisions.

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Two important provisos to bear in mind is that of s. 74(2) and s. 74(3) and that is: “no such order shall modify any State law”; such being necessary so that there be no infringement of art. 74 of the Federal Constitution. This means that nothing in any order made under s. 74 shall modify the Sabah Maintenance Ordinance which confers upon a magistrate of the first class jurisdiction to hear maintenance applications under that ordinance. This means that s. 111 of the Subordinate Courts Act 1948, where the powers hitherto exercised by a magistrate of the first class was given to a Sessions Court, has no application whatsoever to the Sabah Maintenance Ordinance, it being a State law. Therefore, a magistrate of the first class shall continue to have jurisdiction under the Sabah Maintenance Ordinance. Thus, the decision in *Shim Tshun Fatt v. PP* [2001] 1 CLJ 154 does not apply to the jurisdiction conferred by the Sabah Maintenance Ordinance. For the same reasons, a magistrate of the first class where the offences fall within their jurisdiction would continue to have jurisdiction if such jurisdiction had been conferred by other State law, such as the Forests Enactment. The Forests Enactment created certain offences, like those under s. 30, which carry a penalty of two years imprisonment and fine of five thousand dollars while others, like those covered by s. 33(1) provide for a term of one year and two thousand dollars, all of which are within the criminal jurisdiction of a magistrate of the first class since s. 85 of the Subordinate Courts Act confer upon him a jurisdiction to try offences for which the maximum term of imprisonment does not exceed ten years or with a fine only. Therefore, all offences within the jurisdiction of the magistrates of the first class under the Forests Enactment are triable by a magistrate of the first class. To hold otherwise in respect of the two State law I have just referred to, would allow the modification of a State law which would be a form of legislation on State law, a matter which is strictly within the province of the State since those State laws are not in the Federal List nor in the Concurrent List (see art. 74 of the Federal Constitution). This leads me to consider the effect of s. 111 of the Subordinate Courts Act on various Federal laws.

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- a* Section 111 together with other sections were inserted as a result of the exercise of the power under s. 74, *supra*. The power to modify the law is to be exercised when it is “necessary or expedient in consequence of the passing” of the Malaysia Act 1963, such as to include reference to Sabah and Sarawak instead of only to the Federation of Malaya. The modification
- b* has also to take into account matters within the powers of certain authority of the State, like land without title and where the parties are natives, so as to exclude the application of certain sections of the Act. In order to understand why all those modifications had been made, one must look at the history of the Malaya Courts Ordinance 1948. That Ordinance was
- c* passed to consolidate the relevant law then existing in Johore, Kedah, Kelantan, Perlis, Trengganu and the Straits Settlement. Under those States, various judicial officers were already appointed having criminal and civil jurisdiction and not all of them had proper legal qualification. The Courts Ordinance 1948, s. 60, made it a condition for a person to be appointed
- d* as President of the Sessions Court, that he must be “qualified to practise as an advocate in a Court in the Federation or in England ...”, hence making the post available only to a person with a legal qualification. Consequent upon that s. 61 of the Courts Ordinance 1948 removed the jurisdiction of District Judge, Magistrate or Coroner and conferred it on the President of the Sessions Court. This is how that section is worded:
- e*
61. From and after the commencement of this Ordinance, and subject to the provisions and limitations therein contained, all powers, duties and functions which, by any written law in force in the Federation or any part thereof at the date of such commencement, were vested in a District Judge, Magistrate of any description or Coroner shall, without prejudice to the
- f* provision of section 80 of this Ordinance, be vested in the President of a Sessions Court.
- That provision affected District Judge, Magistrate or Coroner who were already appointed just before the coming into force of the Courts Ordinance 1948. It provided an interim measure for a President of a Sessions Court
- g* to take over their jurisdiction until new magistrates are appointed under the Courts Ordinance 1948 except for the then existing District Judges who were, under s. 110 of the Courts Ordinance, deemed to have been appointed Presidents of the Sessions Courts. Now s. 61 is not to affect magistrates who were to be appointed under the Courts Ordinance 1948 since s. 61
- h* defers to s. 80 which made provision for “magistrates **appointed under this Ordinance**” (emphasis added) to exercise the powers of a District Judge, Magistrate or Coroner. That section reads:
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80. From and after the commencement of this Ordinance, and subject to the provisions and limitations therein contained, all powers, duties and functions which, by any written law in force in the Federation or any part thereof at the date of such commencement, were vested in a District Judge, Magistrate of any description or Coroner, shall, without prejudice to the provisions of section 61 of this Ordinance, be vested in Magistrates appointed under this Ordinance.

Section 80 also made provision for it to be without prejudice to s. 61 which removed the jurisdiction of officers who were not appointed under this Ordinance except for District Judges who were deemed to be appointed under the Courts Ordinance. To sum up, the whole purpose of those two sections were to remove the jurisdiction of officers (except for Presidents of the Sessions Court and District Judges) appointed before the coming into force of the Courts Ordinance 1948 and for magistrates appointed under the Courts Ordinance 1948 to exercise the powers hitherto exercised by Magistrates or Coroner not appointed under the Courts Ordinance 1948. Therefore, those sections can be said to provide for the transitional period. Under the Courts Ordinance 1948, s. 76(1), the High Commissioner may constitute so many Magistrates' Courts as he thinks fit and such Magistrates' Court so constituted shall be deemed, under s. 82, to be the court of a magistrate of a first class. This again goes to show the intention of the legislature to differentiate between those officers appointed before the coming into force of the Courts Ordinance 1948 and those appointed under it.

The Courts Ordinance 1948 underwent many changes which I have mentioned earlier, until it became the Subordinate Courts Act. These provisions, s. 61 and s. 80, were again employed when the Subordinate Courts Act was extended to Sabah and Sarawak in 1981. For the purpose, those sections were amended to read:

61. Transfer of powers to Sessions Court Judge

Subject to the provisions and limitations contained in this Act, all powers, duties and functions which, by any written law in force in Malaysia or any part thereof at the date of the commencement of this Act, or by any law passed or made before the commencement of this Act and coming into force after such commencement in Malaysia or any part thereof, were vested in or conferred or imposed upon, or expressed to be vested in, conferred or imposed upon or which would, if this Act had not been passed, have been vested in or conferred or imposed upon a District Judge, Magistrate of any description or Coroner of the Malayan Union or of the Federation of Malaya or of Sabah or Sarawak shall, without prejudice to section 80, be vested

a in, conferred and imposed upon the Sessions Court Judge, in the case of a law in force at the date of the commencement of this Act, upon and after the date, and in the case of a law coming into force after the commencement of this Act upon and after the date of the coming into force of that law.

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80. Transfer of powers to Magistrates

c (1) Subject to the provisions and limitations contained in this Act, all powers, duties and functions which, by any written law in force in Malaysia or any part thereof at the date of the commencement of this Act, or by any law passed or made before the commencement of this Act and coming into force after such commencement in Malaysia or any part thereof, were vested in or conferred or imposed upon, or expressed to be vested in, conferred or imposed upon or which would, if this Act had not been passed, have been vested in or conferred or imposed upon a District Judge, *d* Magistrate of any description or Coroner of the Malayan Union or of the Federation of Malaya or of Sabah or Sarawak shall, without prejudice to section 61, be vested in, conferred and imposed upon Magistrates appointed under this Act, in the case of a law in force at the date of the commencement of this Act, upon and after that date and in the case of a law coming into force after the commencement of this Act upon and after the date of the coming into force of that law. *e*

f (2) Every person appointed to be a First Class Magistrate under or by virtue of this Act shall be *ex officio* a Justice of the Peace within and for the Federal Territory or State in and for which the First Class Magistrate was so appointed and all powers, duties and functions which, by any written law for the time being in force in Malaysia or any part thereof, are vested in or conferred or imposed upon, a Justice of the Peace appointed in and for the Federal Territory or any State shall be vested in, conferred and imposed upon every such First Class Magistrate so appointed for the Federal Territory or State.

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General powers and jurisdiction of Magistrates' Courts and Magistrates.

82. General powers and jurisdiction of Magistrates' Courts and Magistrates

h A Magistrates' Court constituted under this Act shall, for all purposes, be deemed to be the Court of a First Class Magistrate, and shall have all the powers and jurisdiction conferred on a First Class Magistrate by this Act or any other written law, and any Magistrate of either class within the local limits of whose jurisdiction the Court is situate may exercise the powers and jurisdiction of the Court:

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Provided that a Second Class Magistrate shall not hold any preliminary inquiry or proceed to the final trial and determination of any cause or matter which is not within the jurisdiction conferred upon him by section 88 or section 92 or by any other written law.

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...

Criminal Jurisdiction of Magistrate.

b

85. Criminal jurisdiction of First Class Magistrate

Subject to limitations contained in this Act a First Class Magistrate shall have jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed ten years imprisonment or which are punishable with fine only and offences under sections 392 and 457 of the Penal Code.

c

By this time, that is 1981, all the magistrates and President of the Sessions Court in West Malaysia were appointed under the Subordinate Courts Act and the magistrates of the first class were exercising jurisdiction to try cases under the Customs Act, Immigration Act, Poisons Act and other Federal Acts where jurisdiction is conferred upon the magistrates of the first class and they do so even up to now. But Sabah at the time of the extension of the Subordinate Courts Act in 1981 had no President of the Sessions Courts because the Sessions Courts did not exist in Sabah. Sabah also had no magistrates appointed under the Subordinate Courts Act 1948. That problem was solved with the appointment of Raymond Wong Tung Chuen (who was then a Stipendiary Magistrate), with effect from 1 June 1981, as the President of the Sessions Court for Sabah (see PU(B) 263/1981) and he covered the whole of Sabah and the reappointment effective from 1 June 1981 of magistrates of the first class under s. 78(b) of the Subordinate Courts Act 1948 who were previously appointed under the Sabah Subordinate Courts Ordinance (see Sabah Gazette Nos. 469 of 1981). Therefore, just as in West Malaysia, the reappointed magistrates would, under the provisions of ss. 80, 82 and 85, continue to have jurisdiction over offences which they hitherto had. This takes me back to s. 111 which is a completely new section in its effect. That section reads:

*d**e**f**g*

Amendment of laws.

111. Where in any written law passed or made before the commencement of the extension of this Act to Sabah and Sarawak, there is, in relation to Sabah or Sarawak:

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- a** (a) a reference to the Court of a Magistrate of the First Class or a District Court there shall be substituted a reference to a Sessions Court;
- (b) a reference to the Court of:
- b** (i) a Magistrate of the Second Class, a Police Court or a Court of Small Causes;
- (ii) a Magistrate of the Third Class or a Petty Court, there shall be substituted a reference to a Magistrates Court;
- c** (c) a reference to a Stipendiary Magistrate or a Magistrate of the First Class there shall be substituted a reference to a Sessions Court Judge; and
- (d) a reference to a Magistrate of the Second Class or a Magistrate of the Third Class there shall be substituted a reference to a Second Class Magistrate.
- d** This section was considered in *Shim Tshun Fatt v. PP* [2001] 1 CLJ 154 where it held:
- On plain and literal reading of s. 111 Subordinate Courts Act 1948, it was obvious that the intention therein was to amend or to substitute “the Court of a Magistrate of the First Class” with a “Sessions Court”.
- e** The court there went on to hold that the magistrate of the first class had no jurisdiction to hear a charge under s. 58(1)(b) of the Immigration Act. It went on to hold that “cases involving statutes affected by s. 111 of the 1948 Act registered and pending in the court of a magistrate of the first class when this decision was delivered would have to recommence all over again”. That section of the Immigration Act refers expressly to “East Malaysia” and to the court of the first class magistrate for the purpose of the trial of offences in these terms:
- f**
58. Trial of offences
- g** (1) All offences against this Act shall be cognizable:
- (a) in West Malaysia, by a Sessions Court and by a Court of a First Class Magistrate; and
- h** (b) in East Malaysia, by a Court of a First Class Magistrate.
- (2) No prosecution shall be instituted in respect of any offence against this Act without the sanction in writing of the Director General or of the Public Prosecutor or his Deputy:
- i**

Provided that nothing herein shall prevent any police officer or immigration officer from exercising his powers to arrest or detain any person under this Act.

- (3) In West Malaysia any Sessions Court or Court of a First Class Magistrate and in East Malaysia any Court of a First Class Magistrate may notwithstanding anything in the Subordinate Courts Act 1948, the Sabah Criminal Procedure Code or the Sarawak Criminal Procedure Code, as the case may be, impose the full punishment prescribed for any offence except that the Court of a Magistrate other than a Stipendiary Magistrate in East Malaysia shall not impose a sentence of imprisonment for a term exceeding twelve months.

Going back to s. 111, one reason for such a provision is probably due to the fact that before 1 June 1980 Sabah had Stipendiary Magistrates and magistrates of the different classes and magistrates court of the first class, second class and third class. Federal and State law passed before 1 June 1980 contain references to such officers and courts. Therefore, the reason for enacting s. 111 is to resolve the anomaly of the pre-1 June 1980 Federal law and State law continuing, after that period, to refer to those officers and offices when they no longer exist after the coming into force of the Subordinate Courts Act 1948. It will be recalled that under that Act, the only Subordinate Courts that are established are Sessions Courts and magistrates' courts (and additionally in West Malaysia, Penghulu's Courts) though magistrate of the second class may preside in a magistrates court with the limited jurisdiction spelt out in ss. 88 and 89. Therefore, there was a need to substitute such reference. However, the plain reading of s. 111 may justify the conclusion that for Sabah and Sarawak only a Sessions Court judge is better able to handle matter which hitherto was within the competence (as it is now in West Malaysia) of magistrates of the first class. Unfortunately, though it is inconceivable that was intended, such a result does obtain if one does not resort to the purposive interpretation of s. 111. It also created the mischief of giving powers in the one breadth under ss. 61, 80 and 85 and taking them away at the next through s. 111. To avoid these problems, s. 111, ought not to be construed in isolation and it must also take into account the limitation imposed by s. 74 of the Malaysia Act under which the modification was made. If read in isolation, it would mean that in every written law that existed before 1 June 1981 (the date the Subordinate Courts Act 1948 was extended to Sabah and Sarawak) reference to a court of magistrate of the first class in relation to Sabah and Sarawak is to be substituted with a reference to a Sessions Court and reference to a magistrate court of a class lower than first class is to be substituted with a reference to a magistrate court. The

- a* officers referred there are also to be substituted, with a President of the Sessions Court substituting for a Stipendiary Magistrate or a magistrate of a first class. Such a wide interpretation would result in magistrates of the first class having nothing to do since most of their duties would have to be taken over by the Sessions Court judges.
- b* That wide interpretation has to be narrowed down. Firstly, “written law” there cannot apply to any State law for the reasons I have given, *supra*, when I considered s. 74 of the Malaysia Act, since State law cannot be changed or modified or altered when resorting to s. 74. Therefore, when a State law states “magistrate of the first class” or “magistrate court of the first class”, those descriptions are unaffected by s. 111 and those courts continue to have jurisdiction which otherwise s. 111 would have the effect of removing it and giving it to the Sessions Court. Thus, “written law” must be confined to Federal law in existence on 1 June 1981 except where the State law refers to a magistrate of the second class or of the third class and the magistrate courts of such class where then those references have to be replaced by magistrates of the first class and magistrates courts.
- c*
- d* Secondly, even in its application to Federal law, the term must be confined to those Federal law that specifically mentioned and made provisions in “relation to Sabah or Sarawak” which can be interpreted to mean also “East Malaysia”. Section 58(1)(b) of the Immigration Act appears to be such a Federal law as it made specific reference to Sabah or Sarawak by using the term “East Malaysia”. It will be noted that the term “Stipendiary Magistrate” was used in that section and such a term could only have been used when reference was made in relation to Sabah and Sarawak where such officers existed and not in West Malaysia. Hence, I am in respectful agreement with the decision in *Shim Tshun Fatt v. PP* but only in its application to the Immigration Act. Having said that, what remains to be examined is whether other Federal law have a provision similar to that of s. 58(1)(b) of the Immigration Act.
- e*
- f*
- g* Of immediate concern is the Customs Act and the Poisons Act because consequent upon the decision of *Shim Tshun Fatt v. PP* and though that case concerns the interpretation of the Immigration Act, a directive was issued to have offences under the Customs Act and under the Poisons Act tried only by the Sessions Courts. The Customs Act does not have provision even remotely resembling s. 58(1)(b) of the Immigration Act.
- h* There is no specific reference to Sabah and Sarawak or to East Malaysia. Therefore, I am of the view that s. 111 does not affect at all the operation of the Customs Act and the jurisdiction conferred there upon the magistrates court of the first class to try offences under that Act.
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As for the Poisons Act, s. 33 made reference to Sabah and Sarawak and provide only for the Sessions Court to have jurisdiction to try offences under that Act. So the Sessions Courts shall continue to hear offences under the Poisons Act.

a

As for the argument that magistrates of the first class have no jurisdiction under the Juvenile Courts Act in view of s. 111 of the Subordinate Courts Act 1948, it depends, as mentioned earlier, on whether that Act contains any specific reference to Sabah and Sarawak or to East Malaysia and there is none, which means that a magistrate of the first class has jurisdiction to deal with matters under that Act and is the proper officer to preside over a Juvenile Court.

*b**c*

It was next argued that the juvenile did not enter into an unequivocal plea of guilty. This juvenile together with another was charged with the theft of a motor vehicle, an offence under s. 379A of the Penal Code. Both pleaded guilty to the charge and the juvenile's father was also present in court and admitted to the facts of the case. It was argued that the plea was unequivocal because the two juveniles had blamed each other in the welfare report. But there was no denial that they committed the act and it does not matter who initiated it.

d

The probation report of the welfare officer was the subject matter of the next complaint. It was alleged that the report was not admitted in evidence and that the welfare officer tendering it was not sworn to give evidence on oath. The record shows that the report was indeed tendered after the juvenile had pleaded guilty. The report was then read and explained to the juvenile and he admitted to the truth or correctness of what is stated in the report. Given the admission, there was no need to swear in the probation officer to tender the report. The other facts of the case were the subject of a statement tendered in court and admitted by the juvenile and no witnesses were sworn to give evidence in respect of the matters mentioned in the statement. The juvenile contended that the probation officer should have been sworn in as a witness to tender the probation report, relying on the case of *Ong Ah Thoo v. R* [1949] 15 MLJ 36 where it was said:

*e**f**g*

There seems to have been some doubt in the mind of the learned Magistrate as to the proper method of bringing in the report of the Probation Officer. I think that the right way is for the Probation officer to be called as a witness and to give the substance of the report as evidence. This is done by police officers who are able to furnish valuable reports in all criminal cases which are of great assistance to Judges when it comes to passing sentence.

*h**i*

- a* This case was followed by *Tukiran bin Taib v. PP* [1955] 21 MLJ 24 where it also said that the proper manner of bringing in such a report is by calling the probation officer as a witness and to have him give evidence as to the substance of the report. In my view, when the truth of what is stated in the probation report which had been read and explained to a juvenile is not disputed, it can be used by the court without having to call the probation officer to tender the probation report. There is no requirement under the law that sworn evidence must be led after a person had pleaded guilty before the person can be convicted and sentenced. To insist on sworn evidence when there is no dispute as to the truth of a matter would be a waste of time. Imagine, having to call evidence to prove the facts that constitute an offence which an accused person had pleaded guilty to which would be a natural conclusion if those two cases are to be followed. Therefore, I would respectfully decline to follow those cases. Where there is no controversy and in the matter of sentencing or considering what proper order to pass, the probation report can be used without any formal production as is the practice now. In any event, there is no miscarriage of justice.

- e* The juvenile then contended that there was no common intention between him and the other juvenile. This was contended on the premise that they have blamed each other for initiating the crime. That is not a matter that negates the facts that they went out together planning to do together what they had in fact done.

- f* The final contention of the juvenile is that the detention order is not appropriate or proper because of (1) a failure to take into account the plea of the father to take care of him, (2) the erroneous view that the juvenile had gone into a string of crimes within a period of three days and (3) a failure to take into account that the juvenile has to take his Sijil Pelajaran Malaysia examination. This juvenile and another were jointly charged with three offences (in three charges), viz:

- g* (1) theft on 25 February 2001 at 2.55pm of car accessories value at RM2,470;
- (2) theft on 25 February 2001 at about 7pm of a sports bag in a school badminton court containing RM450 cash and other documents, a racket, a handphone, sports pant and keys; and
- h* (3) theft on 26 February 2001 at 2am of a car valued at RM45,000.

i

So, it is within a matter of 12 hours that all the three offences were committed and not three days. What the time reveals also is that these two juveniles were on a frolic. The facts reveal these. The juvenile with a provisional driving licence was allowed by his father to use his car which he damaged on 24 February 2001 when it overturned in Jalan Buli Sim-Sim, Sandakan. The other juvenile suggested to him to have the car driven to Kota Kinabalu to be repaired for free as the juvenile was afraid to let his father know about the damage. The free repair took the form of sending the car to a shop for the various accessories to be installed to the car and the car was driven away after the installation without paying. That episode resulted in charge (1). Then the theft of the sports bag in the night where the stolen cash provided food and lodging and to which charge (2) relates. The damaged car which they used to go to the badminton court and which was spotted was a giveaway as to who could have possibly stolen the sports bag. The frolic continued with the theft of a car in the early morning as mentioned in charge (3). The duo remained in Kota Kinabalu until they were arrested by the police at about noon on 27 February 2001 where the stolen car was recovered and some stolen items were found in the boot. The arrest also led to the recovery of other items from a hotel room. The juvenile was supposed to sit for his SPM examination in 2001 but was not able to because he was on 17 April 2001 after he pleaded guilty to charge (3) ordered to be detained at the Henry Gurney School which also failed to arrange for him to sit for the examination. A stay of the order was granted on 25 April 2001 but was not effected as the juvenile failed to provide bail and he remained in the school until 3 January 2002 whence he was released after the High Court extended the time for him to appeal. Hence the present appeal.

The first question that comes to mind is this – why is the detention order preferred instead of allowing the juvenile to prepare and sit for the SPM? As events turned out, even the school did not arrange or prepare him for the examination. The learned magistrate was, it seems to me, of the view that the examination would not matter because the juvenile’s “performance at school is weak”. But that does not mean that he is going to fail. After all he has made it thus far to Form V. With the proper tuition he could very well turn out to be a prospect. In any event, providing him with the proper education is a matter of great importance as with education, the path to a good paying job is open to the juvenile and this will provide him with an alternative to crime as a way of life. So the court must encourage him to sit and do well in his SPM examination instead of dismissing him as having no prospect of making it which the learned magistrate seems to have done.

- a* It all started with the father letting the juvenile use the car and the father regretted very much to having done so. The parents wanted a chance to look after the juvenile and with such family support the juvenile might just do well in his study and in his future undertakings. The juvenile is genuinely contrite as the probation report shows and was very worried that
- b* he would not be allowed to continue his study if his school found out what happened. The learned magistrate dismissed the idea of letting the parents take care of the child because the offence of theft is a serious offence as can be seen by the mandatory minimum sentence of one year and the maximum of seven years. Just because the offence of theft of a vehicle is
- c* serious should not disentitle the parents to take care of the juvenile. The learned magistrate should weigh the alternatives, that is of sending the juvenile to the Henry Gurney School or of letting the parents take care of the juvenile, to see which is better. The seriousness of the offence does not weigh much nor the rampancy of such offence. It is in the interest of
- d* the public that the juvenile realized his mistake which he does and that he be properly educated so that he will not be a bother in the future which letting his parents take care of him will provide. What the learned magistrate failed to appreciate is that, this is not a juvenile hell bent on a life of crime but who was placed in a dilemma where, not unexpectedly given his age and fear for damaging the car, a wrong decision was made
- e* to go with the other juvenile to have his father's car fixed in Kota Kinabalu. There, the frolic continued with one theft after another in a space of 12 hours and not three days as the learned magistrate had found. The time he had already spent in the Henry Gurney School would be a sufficient lesson for him and it was a blessing as it shows that the place
- f* is not appropriate as it failed to prepare and arrange for the juvenile to sit for the SPM examination, probably because it has no teacher for the purpose.

- g* In the premises, the order of the learned magistrate handed down on 17 April 2001 is set aside. In its place is the order of discharge after he has been admonished.
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